

12 Geo. III. Public Acts, c. 4.

CONSIDERATIONS

ON THE

A C T

FOR PUNISHING

MUTINY AND DESERTION;

AND THE

RULES AND ARTICLES

For the Government of

HIS MAJESTY'S LAND FORCES.

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H.B. T. Linn

CONSIDERATIONS

OF THE



IN THE

HOUSE OF COMMONS

AND IN THE HOUSE OF LORDS

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1841

CONSIDERATIONS

ON THE

A C T

FOR PUNISHING

MUTINY AND DESERTION.

THE necessity and legality of keeping up a standing army within the kingdom in times of peace, are points that have been long and often debated; they are not however those I mean to discuss at present, though I cannot help observing, that the constant renewal of the act for its continuance seems a proof not only of the necessity, but of the propriety of the measure. But that there is an absolute necessity, whenever

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there

there is a standing army existing, of establishing discipline and good order amongst them, is too evident to have ever, I believe, been contested; for a lawless soldiery, as M. Saxe observes, are more dangerous to the state that maintains them, than even its declared enemies: to consider then the proper methods of putting this in execution shall be the purpose of the following sheets.

THE legislature, sensible of the expediency of military subordination, have constantly, by the same act that provides for the maintenance of the troops, authorised the exercise of martial law amongst them. This act occasioned violent debates in the house of commons, upon every renewal of it, for several years successively after the peace of Aix-la-Chapelle, though not from
any

any doubt of the necessity of enforcing military discipline by martial law, but with regard to the nature and mode of this code of laws; many necessary alterations and amendments were annually proposed and made, whilst others equally so were rejected, though not without much contention; but latterly it has passed year after year, as a matter of course, without the least altercation, and with very little amendment, though it appears in its present form, as a learned author* very justly observes, to be in many respects very hastily penned.

By this act his majesty is empowered to make articles of war, and constitute courts martial, with power to try all offenders against military discipline by such articles, and inflict penalties and punishments.

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* Judge Blackstone.

As by the nature of our constitution the king can do no wrong, all his public actions being supposed to be guided by the advice of his ministers, we are naturally led to attribute the framing of these articles to the secretary at war, as the minister of that department, and by whom the act is annually ushered into the house of commons. What an extensive power is here lodged in the breast of an individual, who, whatever his abilities as a statesman, and his goodness of heart as a man, may be, being in general neither a lawyer nor a soldier, cannot be an adequate judge of either the legality or propriety of what he is authorised to enact!

“It is one of the greatest advantages
 “of our English constitution,” says
 Judge Blackstone, “that not only the
 “crimes

“ crimes themselves which it punishes,
 “ but also the penalties, which it in-
 “ flicts, are ascertained and notorious ;
 “ nothing is left to arbitrary discretion,
 “ the king, by his judges, dispenses
 “ what the law has previously ordained,
 “ but is not himself the legislator.
 “ How much therefore is it to be re-
 “ gretted that a set of men,” (speaking
 of the soldiery) “ whose bravery has
 “ so often preserved the liberties of
 “ their country, should be reduced to
 “ a state of servitude, in the midst of
 “ a nation of freemen ! for Sir Edward
 “ Coke will inform us, that it is one
 “ of the genuine marks of servitude,
 “ to have the law, which is the rule of
 “ our actions, either concealed or pre-
 “ carious. *Misera est servitus, ubi jus*
 “ *est vagum aut incognitum.*”

“ I do not know,” says the Marquis Beccaria in his most excellent Essay on Crimes and Punishments, “ of any exception to this general axiom, that every member of society should know when he is criminal and when he is innocent. The uncertainty of crimes hath sacrificed more victims to secret tyranny, than have ever suffered by public and solemn cruelty.”

BUT what renders these circumstances still more severe on the army is, that they are peculiar to it; for though the officers, &c. of the navy are also subject to martial law, that law is not left to be defined by any one branch of the legislature, but ordained by express rules, articles and orders, enacted by the whole legislative power of King, Lords and Commons, and in those articles almost every possible offence is inserted,

inserted, and the punishment thereof annexed.

FROM whence this partiality arose, it is hard to determine. The navy has generally been called the bulwark and safeguard of Great Britain, and may perhaps from this consideration, have been more attended to. I would by no means wish to encrease the jealousy already entertained against a standing army, by making comparisons; but yet I must insist that whilst the existence of such a body is thought necessary, they are equally intitled to the attention of the whole legislature.

MARTIAL law, from not having been built on fixed principles, but intirely arbitrary in its decisions, has been brought into disrepute; it is, says Sir Matthew Hales, in truth and reality no

law, but something indulged rather than allowed as law ; it is therefore much to be wished, not only by those particularly governed by it, but by the community in general, that the legislature would take the matter into their serious consideration upon the renewal of the mutiny act, which is soon to take place, according to annual custom, and render martial law rather more consonant to the principles of the constitution.

DURING the reign of Queen Anne, some doubts having arisen, at the board of admiralty, concerning an act passed 13 Car. II. for the regulating and better government of the navy, ships of war, and forces by sea, the queen, upon application to her, directed the judges to consult and give their opinion on the said act. Were this same learned bench to be consulted on a revision of
the

the mutiny act, and assisted by such military men and others, as could give them information in points peculiar to the profession of arms, there can be no doubt of the many errors it has long contained, being amended. One of that respectable body (whom I have just now quoted) has given such an eminent mark of his consideration for the British soldiery, whom he generously admits to have often preserved the liberties of their country ; and shewn such a desire for a revision of this act, as leaves no doubt of the readiness and alacrity, with which he would join in the undertaking.

I would by no means wish to have my meaning misunderstood from what has been said. The king has by his prerogative the sole command of the army, and the power of appointing
courts

courts martial, for he being the supreme magistrate of the kingdom, and intrusted with the whole executive power of the law, no court whatsoever can have any jurisdiction, unless it some way or other derive it from the crown : these rights and privileges I wish to see preserved to him most inviolably ; and could I suppose any one so futile and absurd as to argue that this interposition of the other branches of the legislature would any wise infringe upon the prerogative of the crown, with regard to its supreme command over the army, I need only state to him the case of the navy. His majesty has equal power and command over it, and yet the parliament making express rules and articles for its government has never been judged an infringement upon the prerogative : the command of the navy and army has been long vested in the crown, and the il-

illustrious house of Hanover has given us no reason to lament this part of our constitution. All I have been contending for and wish sincerely to see happen is, that it may be thought worthy of the wisdom of parliament to assume their legislative authority by ascertaining the limits of military subjection, and enacting express articles of war, for the government of the army, as is done for that of the navy, and leave the execution of them in the hands of the crown. His majesty will still preserve his just power and command over the army, with his right of rewarding and punishing; the former, as he dispenses mercy, by his own gracious will and goodness; and the latter by laws constitutionally enacted by the whole legislature.

BUT besides the precariousness and uncertainty of the law, by which the
 soldiery

soldiery are governed, they labour under another disagreeable circumstance, which is peculiar to their profession, and bears rather too much the aspect of slavery, and therefore also calls for the interposition of parliament; I mean that of their being engaged for life. Hard is a poor wretch's fate indeed, who is allowed but twenty four hours to settle his destiny for life! for no more does the law admit of for the relief of those hastily inlisting.

MEN thus inlisted, and who were perhaps inveigled into the service when in liquor (a practice too common) fancying themselves in a state of perpetual servitude, will either desert, as the only probable means of escaping from a situation, which to any one brought up with the notions of freedom that the generality

lity of Englishmen are, must have a very horrid appearance ; or should they not take so desperate a remedy, the idea of being bound for ever to a manner of life, which they perhaps at first disliked, will damp that spirit so necessary to a soldier, and they will become rather a burthen than an advantage to the service ; whereas men who are enlisted for a certain number of years will seldom or never run the risk attending desertion, though they may be ever so much disgusted with the service, as they are certain of being able to quit it with reputation, when that term is elapsed ; and those who have become soldiers from inclination and principle will readily renew their engagements, provided the contract made with them is punctually observed, for without a resolution of this sort is positively determined

terminated on by government, it were better that the scheme never took place.

HITHERTO I have reasoned on this matter as a soldier; as a politician I coincide in sentiment with the baron Montesquieu, whose opinion is, that to prevent the executive power from being capable of oppressing, it is requisite that the armies with which it is intrusted should consist of the people; and nothing can be more conducive to this end than dismissing a stated number of soldiers and enlisting others at every renewal of their term, whereby (as the learned judge whom I have more than once quoted already observes) a circulation would be kept up between the army and the people, the citizen and the soldier be more intimately connected together, and the idea of keeping up a standing army
appear

appear less disagreeable to the nation in general.

THE law ascertained, and the mode of enlisting soldiers for a term of years introduced, there is the greatest reason to expect that the army, instead of being composed in a great measure of the dregs of mankind, might soon boast of as good members of society, as other trades and professions. The profession of a soldier has already many allurements, but the ardour of those otherwise devoted to it, is often checked by the uncertainty and severity of its laws ; the latter arising from the former, for uncertainty of itself is a severity ; the legislature therefore by obviating the one will remove the other, for let the laws they enact be ever so rigid, when the penalty attending the breach of any of them is known, the offender himself
cannot

cannot surely complain of severity in the execution of them.

HITHERTO I have been endeavouring to shew how much the act of parliament called commonly the Mutiny act, seems to call for a revision ; and could I flatter myself that the arguments I have made use of would help to bring about an amendment of it, I might here lay down my pen ; but as changes in matters of this consequence are oftner affected by the interest of the proposer than the strength of his arguments, I will now make the painful supposition (though not intirely void of hope that the hypothesis may be badly founded) that the act will again pass in its former shape, and proceed to examine into the [articles of war as they now stand, with earnest wishes that, though I may have neither interest nor arguments strong enough

enough to occasion a thorough revolution in an act of parliament, I may, by pointing out some of the most considerable defects in these articles, induce those, who have the forming of them, to make such amendments and alterations as, I flatter myself, it will appear evident to every impartial reader, they seem absolutely to require.

THE first I shall take under consideration is article the second of section the twelfth, which is thus worded. “If
 “ any inferior officer or soldier shall
 “ think himself wronged by his captain or other officer, commanding
 “ the troop or company to which he
 “ belongs, he is to complain thereof
 “ to the commanding officer of the
 “ regiment, who is hereby required
 “ to summon a regimental court martial
 “ for the doing justice to the complainant; from which regimental
 C “ court

“ court martial, either party may, if
 “ he thinks himself still aggrieved, ap-
 “ peal to a general court martial ; but
 “ if upon a second hearing, the appeal
 “ shall appear to be vexatious and
 “ groundless, the person so appealing
 “ shall be punished at the discretion of
 “ the said general court martial.”

THIS article, if not an absolute con-
 tradiction to article the fifteenth of sec-
 tion the fifteenth, which says, that “ No
 “ commissioned officer shall be cashiered
 “ or dismissed from our service, except-
 “ ing by order from us, or by the sen-
 “ tence of a general court martial, ap-
 “ proved by us, or by some person having
 “ authority from us,” must be allowed
 to be rendered very ambiguous by it ;
 for supposing the complaint to be just,
 and the offence of so heinous a nature
 that the offender deserves *cashiering* ;
 this

this regimental court martial has not power and authority to inflict the punishment adequate to the crime ; where then is the use of summoning a court that cannot do justice to the complainant ?

BUT this is not the greatest objection to this article : let us now suppose that the regimental court martial acquit the officer so complained of, but the complainant still thinking himself aggrieved, appeals to a general court martial ; that this general court martial coinciding in opinion with the regimental one, punish the soldier so appealing ; a strange inference indeed, that because the defendant is not guilty, the plaintiff must be so !

It may perhaps be alledged in vindication of this article, that it was intended

to prevent soldiers from litigating trifles with their officers, and thereby hurting the service; if that is the intent, let it be done in a regular and legal way.

ALL wrongs done by an officer to a soldier are wrongs done to the service, and for such he is to be prosecuted at a general court martial by the judge advocate in the king's name; in cases therefore of an appeal by a soldier against an officer from a regimental court martial to a general one, this soldier will be sworn and examined as a witness for the crown; and should any part of his evidence appear false or groundless, or his conduct any ways tending to subvert good order and military subordination, let him be brought to a subsequent trial as a defendant, and be prosecuted by the judge advocate for such crimes and misdemeanours;

this would be equitable, this would be legal; the present mode of proceeding is neither.

HAD that Pseudo-Patriot Dr. Lucas, in his pamphlet intituled *A Mirrour for Courts Martial, &c.* occasioned by a court martial which condemned a mat-trofs of the Irish artillery to punishment, on this article, censured the law, by which the man, though the plaintiff, was condemned; he would have en-creased his credit with the public more than he lessened it, by the illiberal abuse and notorious falsehoods, which he exhibited against the members of the court martial, who religiously stuck up to the letter of the law.

THE next articles I shall take notice of are the 17th and 18th of section the 15th, which run thus: 17. " To the

“ and that offenders may be brought
 “ to justice, we hereby direct, That
 “ when any officer or soldier shall com-
 “ mit a crime deserving punishment ;
 “ he shall, by his commanding officer,
 “ if an officer be put in arrest ; if a non-
 “ commissioned officer or soldier, be im-
 “ prisoned, till he shall be either tried
 “ by a court martial, or shall be lawfully
 “ discharged by a proper authority.”

18. “ No officer or soldier, who
 “ shall be put in arrest or imprisonment,
 “ shall continue in his confinement more
 “ than eight days, or till such time
 “ as a court martial can be conveniently
 “ assembled.”

ALL that is to be complained of in
 these articles is, that they are too gene-
 rally worded — what is generally un-
 derstood

derstood in the English service by an officer being put in arrest is, that he shall be confined to his house or apartment upon his parole; this is the medium, which custom seems to have established, though commanding officers sometimes deviate from it; some by putting centinels over them, excluding them from all commerce and connections with their friends, and other acts of severity; others, by admitting those accused of small crimes only, to walk about within certain limits without swords. Far be it from me to condemn those, who endeavour to make misfortunes easy, neither would I blame others, who exceed this medium in cases that are capital, and where there is the least reason to suspect the prisoner of an intention to abuse the confidence reposed in him; but it is too notorious that mankind are sometimes prone to tyranny

and oppression, and though courts martial often censure long and severe confinement, when made use for trifling faults, yet this is scarce adequate to the hardship and indignity officers suffer from the caprice and improper exertion of the power lodged in the hands of a commanding officer.

ARTICLE the 18th directs, that no confinement shall continue more than eight days, or till such time as a court martial can be conveniently assembled; this shews that some attention has been paid to prevent long confinements, but the vague expression, *till such time as a court martial can be conveniently assembled*, opens a vast field for delay. A privation of liberty is of itself far from a trifling punishment, particularly when attended with severity; it ought therefore to be made of as short duration,
and

and of as much ease to the prisoner as possible ; for as every man has a right to be accounted innocent, till he is legally convicted, we should do all in our power to avoid the risk of punishing the guiltless.

I HAVE as yet only mentioned the arrests of officers, but the ascertaining the manner and length of confinement of non-commissioned officers and soldiers, seems equally to claim attention. If it is thought necessary to make a distinction between the punishment of one who has been a deserter from his country and a violator of his sacred oath and promise, and that of another, who has only been guilty of some trifling misdemeanour or irregularity, will not the same reason exist for differing in the mode and length of their confinement ? Imprisonment alone is a sufficient punishment

ment for many crimes that foldiers may be guilty of; and thefe crimes being attended with more or lefs aggravating circumftances, will require longer or fhorter, feverer or more moderate confinement, in order to render the punifhment adequate to the offence.

THE King of Pruffia, who is remarkably exact in the regulations for his troops, has not omitted to take notice of arrefts and imprifonments of officers and foldiers. It would be encroaching on my fubject to repeat what he has eftablifhed on the occafion, * nor indeed would I abfolutely recommend them as a pattern for regulating thefe matters in

* Thofe readers, who chufe to fee the particulars of them, will find them in his Regulations for the Pruffian Infantry, under the article of *Examinations and Courts Martial*.

in the English service, many of them not being calculated for the meridian of Great Britain, such as officers being sent prisoners to the main guard, &c. all I aim at is to shew that some regulations of this sort are absolutely necessary.

ARTICLE the 23d of section the 15th, which runs thus, "Whatsoever commissioned officer shall be convicted before a general court martial of being in a scandalous infamous manner, such as is unbecoming the character of an officer and a gentleman, shall be discharged from our service," is liable to the same objection I made to the two last taken notice of, viz. being too vaguely worded.

THE dismissal of officers, who are convicted of behaving scandalously and infamously, as enacted by this article,
is

is absolutely necessary for the preservation of the reputation of the army, and the existence of that delicate sense of honour, which should be the characteristic of a soldier; but to give an exact definition of what is scandalous and infamous may sometimes puzzle a general court martial, whilst this article and some others continue in such doubtful and ambiguous terms, and are absolute contradictions to one another.

I AM led to this observation by a transaction of not very old date: A field officer, who was notoriously known to have forfeited the character of an officer and a gentleman by selling rum to the soldiers of the garrison where he was quartered, and thereby encouraged the vice of drunkenness amongst them, was brought to tryal before a general court martial for a breach of article the 23d, (just
now

now quoted;) and though his truly scandalous and infamous behaviour was fully proved, he rested his defence upon, and was acquitted by article the 2d of section 28th, which says, that “all officers, soldiers and sutlers shall have full liberty to bring into any of our forts or garrisons, any quantity or species of provisions, eatable or drinkable, except where any contract or contracts are or shall be entered into by us, or by our order, for furnishing such provisions, and with respect only to the species of provisions so contracted for.”

Thus were the members of this court martial, who as individuals must unanimously have condemned this man's conduct, obliged as a judicial body to observe strictly the letter of the law, and acquit him; owing to the ambiguity

biguity of the article on which the charge was founded, and the *improper wording* of that on which he rested his defence ; for it could never surely be the intent of the article that officers should take upon them the menial office of sutlers.

FROM a case that has actually existed of the intention of this 23d article being evaded by another, I shall now proceed to state one which *may* happen.

SUPPOSE an officer receives such an injury or affront that it absolutely behoves him as a man of honour and courage to resent it, or another person imagining that he had received such a one from him, sends him a challenge ; he is reduced to this alternative ; if he fights, the articles of war say he shall be cashiered ; if he refuses the challenge and suffers himself to be ill treated, tho'

a court martial in their judicial capacity would not perhaps condemn him on this 23d article, he having acted agreeable to the articles * against duelling, yet it is well known in what light his conduct would

* Article the 2d of section the 7th. “ No
 “ officer or soldier shall presume to send a chal-
 “ lenge to any other officer or soldier, to fight
 “ a duel, upon pain, if a commissioned officer, of
 “ being cashiered ; if a non-commissioned officer
 “ or soldier, of suffering corporal punishment,
 “ at the discretion of a court martial.”

Article the 5th of section the 7th. “ What-
 “ soever officer or soldier shall upbraid another
 “ for refusing a challenge shall himself be pu-
 “ nished as a challenger ; and we hereby acquit
 “ and discharge all officers and soldiers of any
 “ disgrace, or opinion of disadvantage, which
 “ might arise from their having refused to ac-
 “ cept of challenges, as they will have only
 “ acted in obedience to our orders, and done
 “ their duty, as good soldiers, who subject
 “ themselves to discipline.”

would be regarded, not only by his brother officers, but every other man of honour and spirit.

THUS let him take what part he pleases, he risks the loss of bread; but in one it may be attended with the loss of reputation.

I AM far from being an advocate for duelling; an appeal to arms should be the last resource of individuals as well as nations; yet it cannot be denied that an apprehension of this *ultima ratio* frequently operates stronger, and oftner keeps wrong-headed men within due bounds, than the most persuasive arguments. The laws of England are very severe and express against duelling, and should the event of a duel prove fatal to one of the combatants, the courts of law are always open for the trial of
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the other : causes therefore of so capital a nature can never come before a court martial, except in foreign garrisons and other places beyond the seas, where there is no civil judicature in force ; and on such occasions they would assume the power given them by article the 2d of section the 20th of the articles of war (which I shall hereafter insert) and try the delinquent for murder, and not for the offence against martial law, by a breach of the article against sending and receiving challenges. In cases therefore of duels attended with death to one of the combatants, the tryal of the other, I say, can never come before a court martial, except on particular occasions ; and I believe I may venture to assert that there have been very few, if any instances of either combatant being brought to a court martial, and condemned by virtue of the article of

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war

war against duelling, merely for having engaged in the rencounter, unless there appeared to have been some unfair proceedings on one side; and under such circumstances, the delinquent's crime will surely come under the article against scandalous and infamous behaviour.

FROM what has been said, I think it must appear that, till we can alter the present sentiments of mankind in regard to points of honour, the articles against duelling, and that against scandalous behaviour, will in their present form sometimes interfere with one another, and render the intent of each other void.

THE danger of inferior officers and soldiers opposing the lawful commands of their superior officer, by force of arms or other violence, is sufficiently guarded against by article the 5th of section

section the 2d, by which it is ordained, that
 “ Any officer or soldier who shall strike
 “ his superior officer, or draw or offer
 “ to draw, or shall lift up any weapon,
 “ or offer any violence against him,
 “ being in the execution of his office,
 “ on any pretence whatsoever, or shall
 “ disobey any lawful commands of his
 “ superior officer, shall suffer death, or
 “ such other punishment, as shall, ac-
 “ cording to the nature of his offence,
 “ be inflicted upon him by the sentence
 “ of a court martial.”

THE next article that seems worthy
 of notice is the second of the 17th
 section, which is as follows : “ Notwith-
 “ standing its being directed in the ele-
 “ venth section of these our rules and
 “ articles, that every commanding of-
 “ ficer is required to deliver up to the
 “ civil magistrate all such persons under

“ his command, as shall be accused
 “ of any crimes which are punishable
 “ by the known laws of the land; yet
 “ in our garrison of *Gibraltar*, island of
 “ *Minorca*, forts of *Placentia* and *An-*
 “ *napolis Royal*, where our forces now
 “ are, or in any other place beyond
 “ the seas, to which any of our troops
 “ are, or may be hereafter commanded,
 “ and where there is no form of our
 “ civil judicature in force, the generals
 “ or governours, or commanders respec-
 “ tively, are to appoint general courts
 “ martial to be held; who are to try
 “ all persons guilty of wilful murder,
 “ theft, robbery, rapes, coining or clip-
 “ ping the coin of *Great Britain*, or of
 “ any foreign coin current in the country
 “ or garrison, and all other capital
 “ crimes or other offences, and punish
 “ offenders with death, or otherwise,
 “ as

“ as the nature of their crimes shall de-
 “ serve.”

COURTS martial are hereby authorized to extend their jurisdiction without limits or bounds, with regard to both persons and crimes, without any regular method prescribed or directions given them as to their manner of proceeding. Even in tryals for military crimes and offences, it has been judged necessary to appoint judge advocates for the information of general courts martial, and to prosecute in the king's name; but I believe I may venture very safely to say, without depreciating their merit, that nine tenths of those, who are appointed to this office, though well versed in martial law, and the ordinary methods of proceeding with offenders against it, have never penetrated into the deep and intricate distinctions of the law; and in many causes

that may come before a court martial in a foreign garrison or other place beyond sea, were the judge advocate the most able lawyer, he would nevertheless be at a loss to execute every part of his duty. In cases of one man killing another, the law, allowing for the frailty of mankind, admits of a regular gradation, according to the degree of malice that appears to have attended the act, as wilful murder, manslaughter, homicide *se defendendo*, homicide *per infortunium*, and chance medley; these are in some measure different crimes, and have by the laws of England different punishments assigned them,

SUPPOSE then a cause to come before a court martial, in the examination of which the prisoner does not appear by the evidence given to have committed wilful murder in the eye of the

the law, neither can he be absolutely acquitted of the killing or being the cause of the man's death; how is the court martial to proceed so as to do justice? By the article of war, which is their only authority, they are neither empowered to make such distinctions, nor to inflict any of the punishments allotted by common law to the intermediate crimes between extreme guilt and absolute innocence. — Thus reduced to the alternative of punishing capitally or not at all, humanity will naturally incline the court to the side of lenity rather than that of severity; and strict justice, the proper medium, be thereby often evaded.

THEFT is also a general term, and is distinguished by law into robbery, burglary, grand larceny, petit larceny, &c. according to the value of the goods

stolen, and the time and manner of committing the theft, which are all differently punished ; some capitally, others not : and though in rapes the law admits of no medium between conviction and an absolute acquital, there are many very particular circumstances required to prove the fact, which men not well versed in law are unacquainted with.

IT is not my intention to enter into a long detail of these matters ; let courts martial be properly authorized to make these distinctions, and inflict the several intermediate penalties allotted them by law, and they will find authors in plenty to direct them in their proceedings.

THERE are many other crimes that a court martial thus unauthorized and uninformed, will be at a loss how to proceed against ; those I have mentioned
are

are sufficient to shew how much this article in particular, in which not only the soldiery, but every other subject, whose business may lead him into any of our foreign garrisons is concerned, requires alteration and amendment. Our late acquisitions in North America, have much increased the number of places where a court martial is the supreme and only judicature for the tryal of all crimes and persons, and have rendered an explanation of this article more necessary.

I COME now to the last, though not least faulty article. “ All crimes not
 “ capital, and all disorders or neglects,
 “ which officers and soldiers may be
 “ guilty of, to the prejudice of good
 “ order and military discipline, though
 “ not mentioned in the above articles
 “ of war, are to be taken cognizance of
 “ by a general or regimental court mar-
 “ tial,

“ trial, according to the nature and
 “ degree of the offence, and be punished
 “ at their discretion.”

BEHOLD the climax of military servitude ! the parliament, after forming a catalogue of such crimes as they think proper to comprehend under the denomination of capital, delegate a power to the crown of contriving as many inferior ones as it pleases, provided they are not punishable with the loss of life or limb ; and the minister or ministers of the crown having exhausted their fund of invention, hand down this power to a court martial, with the same unbounded authority. Thus let a soldier be even fortunate enough to escape both Sylla and Charybdis, a third hidden rock still lays in his way.

NOTHING

NOTHING surely but an inattention to the consequences that might follow, could have admitted such an article into a code of laws for the government of any set of men in a land of freedom and liberty.

SINCE this article has been added (for it is of much more modern date than the generality of the articles) many others which pointed out inferior crimes and offences that were cognizable by a court martial have been omitted; and indeed with the same propriety they might have expunged all others of the same sort; for whilst this article exists, let the charge against a foldier be what it will, if the court martial assuming the legislative power delegated to them by it of inventing crimes and offences declare this charge to be criminal, they have equal

equal authority to exercise their executive power, and punish the soldier.

AMONG the other articles which were omitted upon the introduction of this last, there was one, which particularly authorized a court martial to take cognizance of soldiers accused of stealing from their comrades. This, in my humble opinion, is a species of theft, and the only one that should come before a military court, not only from its tendency to a breach of good order and discipline, but because the plaintiff or prosecutor would under the like circumstances be amenable before the same judicature; whereas in those committed by soldiers on citizens the case is widely different, a court martial having no power over the latter, and therefore cannot put them on such a footing: a court of law then having equal jurisdiction over both, seems
to

to be the just and legal place of tryal for all other thefts committed by soldiers ;--besides the act * commonly called the Mutiny act as well as the articles of war † direct that any officer, non commissioned or soldier, who shall be accused of any capital crime, violence or offence against the person, estate or property of any of his majesty's subjects, which is punishable by the laws of the land, shall be delivered over to the civil magistrate by the commanding officer, under the penalty of being cashiered, in case of his refusal ; yet since the addition of this last article, it has been too often the custom to try soldiers for thefts of every sort, and other crimes cognizable before the courts of law, by courts martial.

THE

* Page 93.

† Section the 11th.

THE articles I have selected are those which seemed particularly to stare me in the face, and of which the inconveniences, not to say, disadvantages to the service are not merely speculative, but must have been often experienced by officers of any standing in the army; there are many more that would bear amendment, but those seem more immediately to call for it.

AFTER having offered my reasons for wishing to see the whole legislature assume the power of making rules and articles for the army in like manner with the navy, I took great pains to prevent my meaning being misunderstood; and could I suspect that any reader, from what I have said of the articles taken notice of, particularly of the last, would mistake in me a desire of relaxing the bands of military discipline and subordination, I should

should be equally anxious to convince him of his error : So far from it, that I am a zealous advocate for them, when kept up without committing an outrage on humanity, and encroaching on the sacred rights and privileges of freemen. But nothing surely can bear more genuine marks of servitude, as I before observed from Sir Edward Coke, than to have the law, which is to be the rule of our actions, either concealed or precarious. Caligula, we are told, wrote his laws in a very small character, and hung them up upon very high pillars, the more effectually to ensnare the people.

THE King of Prussia, one of the strictest disciplinarians of the age, directs that no recruit shall be sworn and enlisted into his service, till the articles of war, which are in very express terms, with

with regard to both crimes and punishments, are read over distinctly to him, and he acknowledges that he understands every particular well, and afterwards voluntarily offers to be conformable thereto ; whereas in our service, it is enacted that the reading of the second and sixth sections of the articles of war against mutiny and desertion at the enlisting of a recruit shall be deemed sufficient. Little can a man learn of the laws he subjects himself to from these two sections, which are among the few that are in express terms.

LET martial law lay aside its arbitrary decisions, let it be brought nearer to the standard of equity, by having the crimes and offences against it notorious, and the punishments and penalties attending them fixt and firmly established, and then let it be executed with punctuality and

and exactness; crimes are more effectually prevented by the *certainty* than the *severity* of punishment: every man then enters the service with his eyes open, previously knowing the consequences of swerving from the contract he has bound himself by. To deter soldiers from committing crimes, to which nothing can be more conducive than a certain knowledge of the penalties attending them, is surely more eligible than trusting to a reformation by punishment.

HAVING now gone through the several articles that seemed to stand in the greatest need of amendment, and given my reasons for presuming to think so, I shall conclude with offering my opinion with regard to the addition of a new article or articles on courts of enquiry.

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THESE are frequently held in the army, but in whom the power of appointing them is lodged, and what their use and authority are, after their appointment, do not appear ever to have been exactly ascertained; for neither the act of parliament which authorizes the appointing of courts martial, nor the articles of war, make the least mention of them. Those for the enquiry into the conduct of general officers and other important matters have hitherto been held by warrants from the crown, and those for the examination of matters of smaller consequence, by order of the commanding officers of corps and regiments; and provided they do not assume the power of passing sentence and inflicting punishment, this power resting with the king or commanding officers by his appointment, seems neither illegal nor improper. For his majesty by his prerogative having
the

the sole command of the army, with authority to delegate as much of this power to his generals as he thinks proper, it seems but just that he or they should take what method they chuse, of examining into the conduct of those under their command; besides, as it is the prerogative of the crown to dismiss any officer from its service without a tryal, if his majesty condescends to leave the examination of doubtful cases to such a court, and takes its opinion thereon, previous to dismissing or bringing the suspected person or persons to a court martial where they risk being punished with more severity, it may be regarded rather as a mark of clemency than an improper or illegal exertion of authority. Courts of enquiry ordered by generals, or other commanding officers, instead of courts martial; must be looked upon in the same light.

BUT courts of enquiry, not having their use and authority properly ascertained, have sometimes taken upon them to examine the person or persons suspected, as was done by that held for enquiring into the failure of the expedition to the coast of France in the year 1757, which might be attended with dangerous consequences, were it made a precedent on future enquiries of this sort. This enquiry, as Sir John Mordaunt observed in his defence before the court martial, (by which he was, in consequence of the report of the court of enquiry, afterwards tried and acquitted) had all the appearance of a public tryal, except in two circumstances, viz. the witnesses were not examined on oath, and he, who stood accused, was examined; which examination might, as he justly remarked, in its tendency, have

have produced, if the case would have bore it, a charge against himself.

WERE courts of enquiry properly authorized by the articles of war, or rather by act of parliament, (for by that authority they might be empowered to administer an oath to the members and witnesses;) and their business limited like that of grand juries, to the examination of the witnesses for the crown only; thus authorized and restricted they would prevent frivolous prosecutions unsupported by evidence from coming before courts martial, and thereby hinder a too frequent and unnecessary assemblage of that judicature, which, like most other matters, may, by too great familiarity, be brought into contempt.

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